Supreme Court, U.S.
FILED
MAY 22 2001
CLERK

No. 00-1652

IN THE

# Supreme Court of the United States

WILLIAM O. JORDAN,

*Petitioner,*

*v.*

FRANK L. ZORC,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA

## BRIEF IN OPPOSITION

RICHARD A. SHERMAN
LAW OFFICES OF
RICHARD A. SHERMAN, P.A.
*Attorney for Respondent*
Suite 302
1777 South Andrews Avenue
Fort Lauderdale, FL 33316
(954) 525-5885

167091

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

## QUESTION PRESENTED

The question presented is whether the decision of the Fourth District Court of appeal of Florida, which was affirmed by the Florida Supreme Court on denial of discretionary review, reversing a $4.7 million dollar libel and slander Judgment in favor of an elected official and against a constituent for criticizing the elected official, is in accord with the Supreme Court's Decision in *New York Times Company v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) and its progeny.

## TABLE OF CONTENTS


| | *Page* |
|---|---|
| Question Presented | i |
| Table of Contents | ii |
| Table of Cited Authorities | iii |
| Statement of the Case | 1 |
| Reasons for Denying the Writ | 3 |
| Conclusion | 8 |

## TABLE OF CITED AUTHORITIES

*Page*

**Cases:**

*Bose Corporation v. Consumers Union of United States, Inc.*, 466 U.S. 485, 104 S. Ct. 1949 (1984) ..... 5

*Eastern Air Lines, Inc. v. Gellert*, 438 So. 2d 923 (Fla. 3d DCA 1983) ..... 6

*From v. Tallahassee Democrat, Inc.*, 400 So. 2d 52 (Fla. 1st DCA 1981) ..... 6

*Garrison v. Louisiana*, 379 U.S. 64, 85 S. Ct. 209, 13 L. Ed. 2d 125 ..... 4

*Hay v. Independent Newspapers, Inc.*, 450 So. 2d 293 (Fla. 2d DCA 1984) ..... 6

*New York Times Company v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) ..... i, 2, 3, 4, 5, 7, 8

*Newton v. Florida Freedom Newspapers, Inc.*, 447 So. 2d 906 (Fla. 1st DCA 1984) ..... 6

*Palm Beach Newspapers, Inc. v. Early*, 334 So. 2d 50 (Fla. 4th DCA 1976) ..... 5

## STATEMENT OF THE CASE

The City of Vero Beach, Florida was widening a street and was taking land by eminent domain from the homeowners on one side of the street, and the Mayor of Vero Beach, the Plaintiff William Jordan had a house on that street. MAI appraisers were hired by the City and assessed the land at approximately $10,000 per home, and each landowner on the street was paid $10,000 cash, except for Mayor Jordan. When it came time for the City Council to decide how much Mayor Jordan would be paid for his property a closed meeting of the City Council was held. Mayor Jordan hired an appraiser who was not a MAI appraiser who valued Mayor Jordan's property at $50,000, and based on this at the closed meeting Mayor Jordan was paid $32,500, even though the other homeowners on the street had only received $10,000 each.

The Respondent in this case, Frank Zorc, has for years been a member of a watchdog group known as "Indian River Taxpayers Association," which watches expenditures by the City and makes certain that the taxpayer's money is well spent. When Mr. Zorc found out about the secret meeting and the fact that Mayor Jordan was paid $20,000 more than the other homeowners on the street he sent five flyers, which are in the appendix to the Brief of Petitioner, criticizing Mayor Jordan and the City Council. Mayor Jordan in return filed suit against Mr. Zorc for libel and slander.

The trial consisted of a parade of elected officials in Vero Beach who were aggrieved at Mr. Zorc for criticizing various council expenditures over the years, and this parade of elected officials testified that Mayor Jordan was a fine person and that nothing improper was done by the Vero Beach City

Council when it awarded Mayor Jordan three times as much as every other homeowner on the street. Mr. Zorc had also stated in the flyers that the secret meeting violated the Florida Sunshine Law which requires that any action by a governmental entity which takes final action on a matter must be held in public. Elected officials testified that Mr. Zorc libeled and slandered Mayor Jordan by stating that the meeting was a violation of the Sunshine Law, and pointed to the fact that a judge had ruled that the meeting did not violate the Florida Sunshine Law. However, while the case was pending on appeal, the decision of the trial court in that case was reversed by the Fourth District Court of Appeal which held that the secret meeting did violate the Florida Sunshine Law. Additionally, another case was pending in the trial court and the trial judge in that case subsequently held that other activities of the Vero Beach City Council which were the subject of Mr. Zorc's criticism also violated the Sunshine Act.

Accordingly, the decision by the Florida Fourth District Court of Appeal in this case which reversed the Final Judgment by the elected official against the constituent for $4.7 million, which decision was affirmed by denial of review without opinion by the Florida Supreme Court, was correct for three separate reasons:

(1) Under the United State Supreme Court decision of *New York Times Company v. Sullivan*, an elected official cannot recover for libel and slander against a constituent who criticized him related to his activities as an elected official, specifically in this case for recovering three times what the other homeowners on the street recovered and in an illegal meeting of the Vero Beach City Council, which was in violation of the Florida Sunshine Law.

(2) All of the comments in the articles were either substantially true or were opinion; and therefore, under Florida law even if the Plaintiff were not an elected official the articles could not be susceptible to a libel judgment because they were substantially true or opinions.

(3) The articles were "pure expressions of opinion" in that they contained the facts on which the opinions are based, and therefore these are privileged under Florida law as "pure expressions of opinion." Even if an elected official were not involved these could not be susceptible to a libel verdict because they contain the facts and are "pure expressions of opinion," under clear Florida law.

## REASONS FOR DENYING THE WRIT

The Petitioner has given this Honorable Court an inaccurate view of the facts in a misguided attempt to create Supreme Court jurisdiction.

The decision of the Fourth District Court of Appeal of Florida which was affirmed by denial of review without opinion in the Florida Supreme Court is squarely mandated by this Honorable Court's decision in *New York Times Company v. Sullivan*, and its progeny. In fact, if the Florida courts had ruled the opposite and allowed an elected official to recover a libel and slander judgment against a citizen who criticized him for recovering in a secret illegal meeting three times what the other homeowners on his street recovered (which meeting the courts have held was a violation of the Florida Sunshine Law) this Honorable Court might have jurisdiction.

In other words, the case of *New York Times Company v. Sullivan* and its progeny are so clear that an elected official can almost never recover a judgment against a citizen who criticizes him for his actions in office, that if the courts had allowed this judgment of the elected official against the citizen to stand, either the Florida Supreme Court or this Honorable Court would have needed to step in to reverse this because of the unconstitutional result in the trial court.

This Honorable United States Supreme Court in *New York Times Company v. Sullivan*, held that in order for a public official to prevail in a libel trial, he must prove with "convincing clarity" that the alleged falsehood was made with "actual malice," and further the Supreme Court defined "actual malice" as being "with knowledge that it was false and with reckless disregard of whether it was false or not." This difficult test has made it practically impossible for an elected official to recover for libel and slander, was properly applied by the court of appeal in this case. There have practically no cases which have allowed recovery for a public official for libel and slander against a criticizing citizen in the 37 years since *New York Times Company v. Sullivan* was decided.

The Supreme Court further strengthened its decision in *New York Times Company v. Sullivan* with its decision in *Garrison v. Louisiana*, 379 U.S. 64, 85 S. Ct. 209, 13 L. Ed. 2d 125. In the *Garrison* case, the question was whether ill will or intent to harm the public official was sufficient to allow a libel and slander verdict by the elected official, and the United States Supreme Court held that it was not.

The Florida Supreme Court and the state and federal courts of the United States have further strengthened this

rule of law in numerous subsequent cases. The case relied on by the Petitioner of *Bose Corporation v. Consumers Union of United States, Inc.*, 466 U.S. 485, 104 S. Ct. 1949 (1984), is not on point because in *Bose* was a very strong holding against a libel and slander judgment by an elected official, in that it clarified that there is a significant difference between "mere proof of falsity" and "proof of actual malice." The United States Supreme Court held that the plaintiff must show that the citizen ". . . subjectively entertained serious doubts as to the truth of his statement." The burden was not met in the present case, especially where the Florida courts have held that the meeting at which Mayor Jordan was awarded three times as much as the other homeowners on the block, was in fact illegal and a violation of Florida law.

Furthermore, the judgment by the elected official was contrary to Florida law. Therefore even if the Petitioner's claim were in fact valid and that the decision was contrary to the standards of the United States Supreme Court in *New York Times Company v. Sullivan*, the decision is clearly proper under Florida law, and therefore must be affirmed under Florida law regardless of the United States Constitutional Standards.

In the Florida case of *Palm Beach Newspapers, Inc. v. Early*, 334 So. 2d 50 (Fla. 4th DCA 1976), a Florida newspaper embarked upon a calculated campaign designed to bring about the removal of an elected official from office and published several hundred news articles and editorials which were hostile to the elected official, many of which were defamatory. The elected official filed suit against the newspaper and members of the editorial staff and recovered a judgment of $1 million. On appeal to the Fourth District Court of Appeal, the Fourth District held the verdict was contrary to Florida law and reversed.

Further, the Florida courts in the case of *Newton v. Florida Freedom Newspapers, Inc.*, 447 So. 2d 906 (Fla. 1st DCA 1984), held that the question of whether a defendant is aware of the falsity of a defamatory statement or entertains serious doubts as to the truth of a publication, is satisfied only if it is *clear* that the defendant in fact did entertain serious doubts as to the truth of the publication. Therefore, once again, under Florida case law, the decision of the Fourth District was correct and the decision of the Florida Supreme court in denying review, was correct under Florida law.

Additionally, under Florida law the decision of the Fourth District was correct in that: (1) everything in the articles was substantially true or were opinion; and (2) the articles were "pure expressions of opinion." The law in Florida is clear that opinion cannot be the basis for libel and slander under Florida law. *From v. Tallahassee Democrat, Inc.*, 400 So. 2d 52 (Fla. 1st DCA 1981).

Since the articles contained the facts in which the opinion was based, under Florida law they are "pure expressions of opinion" and are protected under Florida law from libel and slander. In *Hay v. Independent Newspapers, Inc.*, 450 So. 2d 293 (Fla. 2d DCA 1984), a case in which a letter to the editor discussed certain facts and criticized the state attorney's office for not prosecuting someone termed a "crook," the court held that under Florida law this was "pure opinion" since the facts were contained in the article and therefore protected.

In *Eastern Air Lines, Inc. v. Gellert*, 438 So. 2d 923 (Fla. 3d DCA 1983), an Easter Air Line pilot criticized Eastern, and a spokesman for Eastern Airlines responded saying "Gellert has been complaining for years. I think you

ought to know that he wrote some very odd letters to the FBI. . . . He said Eastern was out to get him, that we tried to crash a plane in order to kill him. He's paranoid." The Third District Court of Appeal held that under Florida law this was a "pure expression of opinion" and therefore could not be subject to libel or slander.

Therefore, even *arguendo* if this Honorable Court held that for some reason *New York Times Company v. Sullivan* did not apply, nonetheless the decision of the Fourth District would need to be upheld under Florida law because the statements were either true or substantially true, and also were "pure expressions of opinion," which are not subject to libel and slander under Florida law regardless of whether any elected official was involved.

Therefore, the decision must be upheld; under Florida law even if *New York Times Company v. Sullivan* did not apply.

## CONCLUSION

There is no conflict with the case law of the United States Supreme Court which would be sufficient to warrant a petition for writ of certiorari; and in fact, the decision is fully in line with the law of the United States Supreme Court.

However, *arguendo*, even if there were conflict with *New York Times Company v. Sullivan*, nonetheless the decision of the Fourth District Court of Appeal must be affirmed because there are two separate state court bases on which the ruling was correct; namely that: (1) these statements were true or substantially true; and (2) the flyers were "pure expressions of opinion" since they contain the facts on which the opinions were based. Accordingly, the Petition for Certiorari must be denied.

Respectfully submitted,

RICHARD A. SHERMAN
LAW OFFICES OF
RICHARD A. SHERMAN, P.A.
*Attorney for Respondent*
Suite 302
1777 South Andrews Avenue
Fort Lauderdale, FL 33316
(954) 525-5885